JOHORE REPORT

[BEFORE THE COMMISSIONER FOR WORKMEN'S COMPENSATION, JOHORE]
WEISS, COMMISSIONER.
February 19, 1938.

JACOB SAMUEL PILLAY.....Applicant
vs.
HAN YANG PLANTATIONS LTD. Respondents.

[JOHORE BAHRU CLAIM FOR WORKMEN'S COMPENSATION No. 134 of 1937.]

Workmen's compensation—Assault by fellow workman resulting in permanent partial disablement—whether assault an accident arising out of employment.

The hospital dresser on a rubber estate was assaulted by an attendant employed in the hospital. As a result of the assault the dresser lost an eye. The dresser was in a position of authority over the attendant and prior to the assault had recommended his dismissal. There was no evidence of any previous assault upon a hospital dresser in the course of his employment, but there was some evidence of occasional disorderly behaviour on the estate by persons of the race to which the assailant belonged.

Held, following *Reid* v. *British & Irish Steam Packet Company Limited,* (1921) 2 K. B. 319, that the injury was received from an accident arising out of as well as in the course of the dresser's employment.

This case was heard before the Commissioner in Open Court on the 4th and 17th January 1938.

Goho for the applicant.

Withers Payne for the respondents.

WEISS, COMMISSIONER,—The facts in this case are simple and are not disputed. The applicant is the dresser in charge of the hospital on the respondent company's rubber estate at Masai. He is responsible to the estate manager for the efficient administration of the hospital and it is a part of his duties to make recommendations to the manager concerning the employment or dismissal of subordinates.

In consequence of recommendations so made one Raman, a Malayalee who was the hospital attendant and cook, was, on the 1st June 1937, given a month's notice terminating his employment in the service of the respondent Company. On the following morning whilst the applicant was performing his duties in the hospital, Raman approached him and demanded the reason for the notice he had received. On failing to get a reply which pleased him, he picked up a jar containing nitric acid and threw the contents into the applicant's face. This resulted in the loss to the applicant of his right eye, and certain other minor injuries.

Raman was duly prosecuted and convicted on a charge under section 326 of the Penal Code, and is now serving a sentence of five years' Rigorous Imprisonment.

On a former occasion, though on a different estate, the applicant had been threatened with assault by a hospital attendant, but there is no other evidence of any special risk of assault attaching to the duties which the applicant performed. On the other hand there is independent evidence that "Violence among estate labourers is not infrequent," and an admission by the estate manager that "There is always a small percentage of rough, unruly labourers, and that on the whole the Malayalees give the most trouble."

In these circumstances the applicant claims compensation for the injuries he has sustained in an "accident" arising "in the course of" and "out of" his employment.

For the meaning of these terms it is necessary to refer to the English cases in which they have been considered in claims under the Workmen's Compensation Acts on which the Johore Enactment, in this respect, is modelled.

It was held in *Nisbet* v. *Rayne* (1910) 2 K.B. 689, that a wilful and felonious act, although an intentional act on the part of the felon, may nevertheless be an accident from the point of view of the person who suffers injury as the result of that act. This decision was approved by the Court of Appeal in *Mitchinson* v. *Day Brothers* (1913) 1 K.B. 603, and has been followed in all subsequent English and Irish cases; and it is rightly contended in the present case that an "accident" had taken place.

It also conceded, as indeed it must be, that the "accident" arose "in the course of" the applicant's employment.

The respondents deny, however, that the "accident" arose "out of" the applicant's employment. They say:—

Firstly —that his employment is not one to which a special risk is attached;

Secondly—that there is no evidence that his assailant was dangerous; or that he was under any special liability to be assaulted;

Thirdly —that the assault was one to which any other person might have been exposed; and

Fourthly—that the mere performance of his duties could not add to the risk of assault.

I was referred to a number of English cases in which the applicant claimed compensation for injuries sustained as the result of an assault upon him while performing his duties. In each of these cases his right to recover compensation turned on the question of whether or not the ac-

cident could be deemed to have arisen "out of" his employment, but in none were the circumstances quite parallel to those in the case before us.

The following broad propositions may, however, be regarded as settled law:—

(i) "If in the course of his employment a workman meets with injury by an accident which has arisen directly out of the circumstances encountered, because to encounter them falls within the scope of the employment, compensation may be claimed," *per* Viscount Haldane in *Upton* v. *Great Central Rly. Co.* (1924) A.C. 302 at p. 307.

(ii) "If a workman is injured by an accident resulting from a risk to which everyone is subject, but of which it can be said that the workman runs more than the normal risk, the accident arises out of his employment, because the abnormal risk was necessarily incident to the performance of his work," *per* Russell L. J. in *Lawrence* v. *George Mathews Ltd.* (1929) 1 K.B. 1, at p.18.

(iii) "In order that a person can recover he must show a risk of being assaulted —a degree of liability to be assaulted such as would not be present if he were not in the employment," *per* Atkin L. J. in *Lee* v. *S. & J. Breckman Ltd.* (1928) 21 B.W.C.C., 32 at p. 35.

What may perhaps be regarded as the leading case on the particular question with which we are here concerned is that of *Trim Joint District School Board of Management* v. *Kelly* (1914) A.C. 667. In this case an assistant master whilst engaged in his duties at an industrial school, where some of the boys were unruly and badly disposed, was assaulted by two of the pupils in pursuance of a preconcerted plan of attack and killed. It was eventually held in the House of Lords by a majority of four against three that the accident arose out of the employment and that the respondent (the deceased's dependent mother) was entitled to recover compensation.

My attention was directed to the three minority judgments, each of which I have read with care. It was strenuously urged that the views expressed therein are the ones which should be applied to our own case, and that they would have prevailed in *Kelly's* case had the facts in that case been the same.

These views are summarised in the following passage from the judgment of Lord Parker of Waddington at p.718:

> "My Lords, there is another important question arising on this appeal. Even assuming, contrary to my opinion, that Kelly's injuries were accidental within the meaning of the Act, can they be said to have arisen out of and in the course of his employment? I hesitate to come to that conclusion. It would, I think, be a libel on the industrial schools of the United Kingdom to say that an assistant master runs any special risk of being assaulted or murdered, much less any special risk of being the victim of a deliberate conspiracy to assault or murder. Any person may incur the ill-will of others, and, if these others happen to include persons of violent or revengeful temper, may be assaulted and injured in consequence. But this is a risk which every one must run, and does not arise out of any particular kind of employment. If Kelly's injuries arose out of his employment within the meaning of the Act, it would seem to follow that any shop superintendent, any overseer, or foreman, and, indeed, any person placed in authority over others who incurs the ill-will of, and is in consequence assaulted or injured by, some subordinanate, would be entitled to compensation."

The contrary, and the majority, view is succinctly expressed by Loreburn at p.682 as follows:—

> "In enquiring whether or not an injury by accident in fact arises out of the employment, it surely is unnecessary to ask whether such a thing has ever happened before or is likely to happen again within, say, a hundred years, or, for that matter, for ever. It may happen, and has happened, and it has happened because the poor man was a schoolmaster. The event has proved that it arose out of his employment. I can see no reason for saying that there is to be compensation only when the misadventure was one which would be foreseen as probable, or contemplated as possible, or otherwise apprehended either by the workman or by his employer, or by a county court judge. All this has, in my view, no conclusive bearing on the simple question, Did it in fact arise out of the employment";

and the same view is amplified by Lord Shaw of Dunfermline who says:

> "I have had more difficulty, my lords, with regard to the question whether this accident, which undoubtedly arose in the course of the deceased's employment, also arose out of it. But the illustrations which I have given of the warder, the asylum attendant, the gamekeeper, shew

that the question as relating to the nature of the employment is one of degree: and the question is whether the circumstances of this case and the nature of the employment of the late Mr. Kelly were such as to permit it to be stated that he died by injury from accident arising out of that employment. It is, my Lords, a question of circumstances, and, as I have put it, a question of degree. If it is said that the case of a prison, an asylum, or a game preserve, should not be extended to the case of a school, the answer is: It depends upon the circumstances and upon the school."

I confess myself unable to follow that argument that the minority view is the one which is properly applicable to the present case. I see no reason why the same cannot be said, with equal force, of the majority view. Indeed if the matter ended here I should be left bewildered by the conflict of judicial opinion.

Fortunately, however, there are a number of later cases in which truer guidance may be found, including those I have cited above in which broad and general rules have been laid down.

Among such cases the one which most nearly resembles our own is that of *Reid* v. *British* and *Irish Steam Packet Co. Ltd.* (1921) 2 K.B. 319. In that case the applicant, a quay foreman, was assaulted by one of a gang of dock labourers whom he was supervising. The men were of a rough type, but there was no evidence of previous assaults on foremen. As the result of the assault the applicant sustained a severe injury to the eye. It was unanimously held by the Court of Appeal that the County Court Judge was justified in finding that there was a special risk and that the accident arose out of as well as in the course of the employment.

The following passage from the judgment of Lord Sterndale M.R., at p.322 appears to me to cover almost exactly the question in issue:—

"It is quite true that no evidence was given that any assault on a man in this position was known, either to the applicant himself, or to any of the witnesses who were called. He did say he had heard of an assault upon a ship's foreman, but whether an assault by a dock labourer on a ship's foreman would be relevant to an assault on a quay foreman, I do not discuss. If the men were in the habit of assaulting foremen at all, I should think the description of foremen would not matter very much, but at any rate there was no real evidence of any previous assault upon any foreman at all. Was it open to the learned judge upon that evidence to find that an assault of this kind arose out of the employment? It seems to me that it was, because if you put a man in command to exercise supervision and discipline over a lot of men who are described as a rough lot, and given to fighting at times, although not often, if ever, within the dock premises, it does not seem to me that it is impossible to draw the inference that there is a possibility, if not a probability, of the man being assaulted, over and above the probability or possibility of the ordinary citizen being assaulted; I mean by the ordinary citizen a man who has not got to control and direct men of a rough character. Although I think it is a matter to be seriously considered by the judge in coming to his conclusion of fact, I cannot think that the fact that no assault had previously been committed is conclusive to show that it was not a risk incidental to the man's employment. It appears to me that there was evidence upon which the judge could find as he did, and, if so, then the case comes entirely within the authority which I have mentioned. (i.e. *Kelly's* case). It is quite true that that was the decision of a House divided, I think, in the proportion of four to three of the noble and learned Lords: but we have no right to discuss that, we must take the decision as it is, and, in my opinion, upon that point this case falls entirely within that authority."

Now I have said that the circumstances of our own case are not quite parallel with those of any of the English cases.—While they appear to be very similar to those of *Reid's* case, they differ in two respects. Firstly, there is evidence—of which there was none in *Reid's* case—of a threatened assault upon the applicant while in an employment of the same character on a former occasion. Secondly, the assault in the present case arose out of an incident directly connected with the employment. It was the immediate result of the performance by the applicant of one of his duties, and not the mere outcome of some private quarrel or of some grievance bearing no direct relation to the duty performed.

These dissimilarities appear to me to add strength to the applicant's case and to afford ample justification for following the decision in *Reid* v. *The British* and *Irish Steam Packet Co.*

Finally I would observe that the trend of judicial opinion in recent years leans more and more to a liberal construction of the expression "arising out of the employment." In *Blee* v. *London* and *North Eastern Rly. Coy.*, the full report of which is not yet available, the workman, while walking from his home to the place of his employment, received injuries in a street accident

and subsequently died. Payment of his wages was calculated from the time he left home, but there was no special risk in getting from there to his work. Three months ago it was held by the House of Lords that there was evidence from which it could be inferred that at the time of the accident the deceased workman was actually engaged in the performance of his contract of service and that the accident arose out of as well as in the course of his employment.

It is true that the principal question in issue there was the time at which the employment commenced, but the case illustrates, nevertheless, the tendency to show a lesser regard to the presence or absence of a special risk, than was deemed essential by Lord Parker of Waddington in *Kelly's* case in 1914. If, then, an accident unconnected with the employment can be said to arise out of the employment merely because the risk of incurring it is an incidental risk, surely an accident resulting from an act done in the course of the employment itself, should be deemed *a fortiori* to arise out of the employment!

On the whole I think there is sufficient evidence from which to infer that the applicant was exposed by his employers to the risk of assault, and sufficient material on which to hold that the assault which led to his injuries was an accident arising out of as well as in the course of his employment.

The amount of compensation recoverable for the loss of the eye has been agreed by the parties at the figure of $860/-, and an award will be entered for this amount.

There remains the question of the minor injuries. I have considered carefully the evidence adduced by the applicant but am left in doubt as to whether these injuries, however distressing they may have been, will or will not permanently impair his earning capacity to any assessable degree. I understand that each party wishes to offer further evidence on this issue, and accordingly I make no decision upon it at present.

In regard to costs, the applicant has been successful on the main issue and should, I think, be allowed the costs recoverable on the amount of the award. The question of any further costs that may be recoverable on the minor issue must be reserved until that issue has been decided.

I certify that a substantial question of law has arisen in this case, and give leave to the respondent Company to appeal if so advised.

Award accordingly.

Solicitors for the Applicant—
S. C. Goho & Co.

Solicitors for the Respondents—
Drew & Napier.